

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

77-1349

To be argued by
LEONARD F. JOY

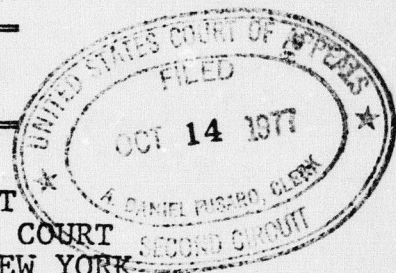
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,
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Plaintiff-Appellee,
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-against-
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HENRY BENTON,
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Defendant-Appellant.
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Docket No. 77-1349

BRIEF FOR APPELLANT

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK



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_____, 19

I certify that a ^{corrected} copy of this brief [REDACTED] has been mailed to the United States Attorney for the Southern District of New York.

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-against-

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BRIEF FOR APPELLANT

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

QUESTION PRESENTED

Whether the Government failed to prove appellant's guilt
of aiding and abetting the uttering of forged United States
Treasury checks.

STATEMENT PURSUANT TO RULE 28(a)(3)

Preliminary Statement

This appeal is from a judgment of the United States District Court for the Southern District of New York (the Honorable Robert J. Ward) rendered on July 21, 1977 after a trial, without a jury, convicting appellant Henry Benton of two counts of aiding and abetting the uttering of two forged United States Treasury checks (Counts I and II) (Title 18, United States Code, §§495 and 2), and sentencing him to a two-year term of imprisonment on Count I, and five years probation on Count II, the probationary term to commence upon termination of appellant's imprisonment. The appellant is on bail pending the determination of this appeal.

By order, this Court continued The Legal Aid Society Federal Defender Services Unit, as counsel on appeal, pursuant to the Criminal Justice Act.

Statement of Facts

A. The Indictment*

On June 9, 1977, an indictment was filed, charging appellant Henry Benton and his sister Marjorie with uttering five forged United States Treasury checks (Counts I through V) and

*The indictment is "B" to appellant's separate appendix.

possessing a sixth check, which had been stolen from the mail (Count XIII).*

B. The Government's case**

The Government's theory was that co-defendant Marjorie Benton opened a checking account at a Bronx branch of the Chemical Bank under the name of Linda Perez; that she committed the crimes charged by forging the endorsements on six checks*** which had been stolen from the mail and then depositing them to the Perez account; and that appellant Benton aided and abetted his sister's uttering of those checks.

George Leitenis, an employee of Chemical Bank, testified that on April 4, 1977, a woman, identified at trial as the co-defendant Marjorie Benton, opened a special checking account in the name of Linda Perez at a branch of the bank in the Bronx, New York (R29, 30).**** On the account application (GX8), she gave her address as 2042 Webster Avenue, Bronx, New York.

*Marjorie Benton had previously entered a guilty plea to several counts of the indictment and was not tried with appellant.

**Appellant waived a trial by jury and, accordingly, was tried before Judge Ward sitting without a jury.

***Five of these checks were U.S. Treasury checks and the other was a check drawn on the Connecticut Bank and Trust Company. The Government made no claim that appellant personally forged the respective endorsements or deposited the checks.

****Numerals in parentheses preceded by "R" refer to pages of the trial transcript. Numerals preceded by "GX" refer to the number of the Government's exhibit in evidence.

Leitenis stated that a total of \$1,440.42 had been deposited in the account. The deposits consisted of an initial deposit of \$60 in cash (GX8; R30); a second deposit of \$1,128.65 in checks made on the following day at another branch of the bank (GX9; R31); and a final deposit of \$251.77 in checks made on April 7, 1977 (GX9A; R48, 50).

On April 8, 1977, shortly before 2:00 p.m., the co-defendant, representing herself to be Linda Perez, entered the Chemical Bank and requested two blank "counter" checks from Mr. Leitenis. After the co-defendant was given the checks, she left the bank and returned a short time later with a counter check for \$1,200, which she cashed with Leitenis' approval. The \$1,200 represented all of the collected funds in the account. The remaining \$240.42 had not been collected and were not funds which could be withdrawn (R45, 46, 48, 49).*

A short time after the co-defendant cashed her \$1,200 check, appellant entered the bank and attempted to cash a second bank counter check in the amount of \$220.00 drawn to his order and signed by Linda S. Perez (GX11; R35). After presenting the check to Mr. Leitenis for his approval and being asked what the check was for, appellant replied that he had done some boiler work for Mrs. Perez (R35). Leitenis ascertained that the check

*It was conceded at trial that Linda Perez and Marjorie Benton were the same person.

was drawn against uncollected deposits in the Perez account and advised Benton to return when the funds had cleared (R35, 36). However, Leitenis, advised the branch manager to check the account.

On April 12, 1977, appellant Benton telephoned the Chemical Bank and asked Leitenis if the check would be honored. Leitenis told appellant that he had been trying without success to reach Linda Perez by telephone (R39). After being asked if he knew Perez' correct number, appellant stated that it was 589-8547 (R39). The next day, appellant called the bank again and was told to come in and cash his check (R39, 40).

Postal Inspector Frank Gonzalez, testified that on April 13, 1977, he was investigating the account of Linda S. Perez and was in the bank when appellant Benton entered on that day to cash the check. There Gonzalez told appellant that an investigation of Linda Perez' account was being conducted and asked appellant the reason for his receipt of the check. Appellant replied that he had received the check in payment for repairs in the home of Linda Perez (R67). Further, after inquiry, appellant said he knew where Linda Perez lived, and would take Gonzalez and another postal inspector, Juan Albornoz, there. Leaving the bank, Inspector Albornoz asked appellant if he could look inside the vinyl bag he was carrying, whereupon appellant opened it, revealing a fifteen-inch crowbar and some envelopes and papers. In the postal inspectors' car, appellant said he did not know where Miss Perez lived or her telephone

number (R68). They proceeded to the post office where, after questioning, appellant was arrested.

Pursuant to a search of appellant incident to his arrest, Gonzalez recovered a business card from the John Webster's Rug Cleaning firm, which was admitted in evidence (GX13; R79). On the reverse side of the card were hand-written the numbers 1 through 10, and opposite the first two numbers the figures 239⁰⁰ and 349⁰⁰ followed by 4/1/77 and 4/4/77. The card also contained in handwriting the name Per~~az~~ and a telephone number.* There was no testimony as to the authorship of the handwritten items.

After appellant's arrest, the postal inspectors showed appellant copies of the checks deposited in the Perez bank account and asked if he had ever seen any of them. Appellant replied that he had not (R110), stating that the \$220 check he had received represented rent payments made by Linda Perez (R124).

Further, Inspector Gonzalez testified he went to 2042 Webster Avenue in the Bronx, a two-family house where appellant lived. On the outside door there was a strip of masking tape containing the following handwritten names: Sparks, Berrios, Benton and Perez (R82-83).

Ivy Brown, the payee of one of the checks which had been deposited in the Linda Perez account, testified as part of the Government's case. She stated that she received disability insurance checks on the third day of every month; that she

*A copy of this card, GX13, is annexed as "C" to appellant's separate appendix.

did not receive a check on April 3rd; and that her mailbox had been broken into on April 1st (R7, 9). The amount of her check was \$239.30. Noel Watkis, another payee of a check deposited in the Perez account, testified that he had not received his check and that his mailbox had been broken into on April 4th (R15, 18).

At the close of the Government's case, appellant Benton moved for a judgment of acquittal, which was denied (R130). The defense did not present any evidence, but again renewed the motion for a judgment of acquittal, arguing, among other things, that the crimes charged had been completed prior to any involvement by appellant (R145, 146). The Government contended that appellant had aided and abetted his sister and co-defendant, Marjorie, by covering up her use of the alias Linda Perez. Further, the Assistant United States Attorney contended that appellant's participation in the crimes was shown by his possession of the business card (GX13) and the notations on it, and by the crowbar. The Government's position was that the check for \$220 was appellant's share in the venture.

C. The Verdict*

The District Court found appellant guilty of the charges in Counts I and II and not guilty of Counts III, IV, V and XIII. As to Counts I, II, III, IV and V, Judge Ward found that the Government had proved beyond a reasonable doubt that the checks involved were genuine obligations of the United States, and

*The District Court's findings of fact and conclusions of law are "D" to appellant's separate appendix.

that co-defendant Marjorie Benton had forged the respective endorsements with intent to defraud the United States (R170, 171). Thus, the District Court concluded that the only issue was whether appellant aided and abetted his sister in the commission of the crimes charged. To support his finding of guilt on Counts I and II, the district judge relied on appellant's false statements with respect to Linda Perez, as well as the business card containing the handwritten material on the back, which, the district court concluded was written by appellant (R173-174). Judge Ward also found that appellant used the crowbar possessed on April 13, 1977, to break into the mailboxes of payees Ivy Brown (Count I) and Noel G. Watkis (Count II) on April 1st and April 4th, respectively. He further found that appellant stole one United States Treasury check from each of those two mailboxes on those occasions; that after recording on the business card the amounts of the checks and the dates of their theft, appellant gave the checks to his sister, who then deposited them in the Perez account at the bank (R174, 175).

ARGUMENT

THE GOVERNMENT FAILED TO PROVE
APPELLANT'S GUILT OF AIDING AND
ABETTING THE UTTERING OF FORGED
UNITED STATES TREASURY CHECKS.

The Government's theory at trial was that appellant aided and abetted his sister's uttering of forged Treasury checks, in violation of 18 U.S.C. §495. To prove appellant's guilt of the crimes charged in Counts One and Two, the Government was required to show that the co-defendant, intending to defraud the United States, deposited the Brown and Watkis checks in the Perez account, knowing the endorsements on those checks to be forged, and, most importantly, that appellant aided and abetted her in the scheme. Thus, to show that appellant aided and abetted the commission of his sister's criminal acts, the Government had to establish that appellant took some physical action to help his sister, that he "consciously assisted the commission of the specific crime in some active way", United States v. Dickerson, 508 F.2d 1216, 1219 (2d Cir. 1975); United States v. Peoni, 100 F.2d 401 (2d Cir. 1938); see Nye & Nissen v. United States, 336 U.S. 613, 619 (1949); and also that he had the knowledge and intent requisite for the crime, 18 U.S.C. §495 (knowledge that the checks were forged and the intent to defraud the United States). However, the evidence adduced at trial failed to prove these required elements.

The Government's evidence, viewed in the most favorable light, established only the following: (1) on April 8, 1977, appellant attempted to cash a \$220 personal check received from his sister and drawn on her account; (2) when arrested five days later, appellant had in his possession a crowbar and a business card, on the back of which was written in an unidentified handwriting the amount of the Brown and Watkis checks and the dates they were stolen; (3) these checks were Treasury checks which had been stolen from the payees' mailboxes, which boxes had been "all broken up"; and (4) at his arrest, appellant made a number of false statements to the authorities as to the source and reasons for his receipt of the \$220 personal check from his sister.

There was no proof that appellant participated in any way in the crime of uttering the forged Treasury checks. The crime of uttering was completed on April 7, when co-defendant Marjorie Benton made the last deposit to her account. Consequently, the Government had to have shown that appellant participated with or assisted his sister before that date. However, the entire direct testimony produced at trial concerned appellant's conduct after the crime was completed.

Further, possession of the business card and the crowbar do not make up for the defects in the proof of knowledge or active participation. There is no proof as to when appellant received either the card or the crowbar. Even if appellant had the business card at a time prior to April 7, it supplies no proof that

he saw the checks or took any action with respect to them. Thus, there was no showing that appellant had any knowledge whatsoever of the false nature of the checks involved or their theft.

Even assuming the notations on the card somehow gave him knowledge of some kind of theft, there is nothing which would indicate they were stolen checks or, if stolen checks, that they were stolen Treasury checks. Certainly this is so since there was no evidence that the writing on the card was in appellant's handwriting. Most importantly, this evidence did not constitute proof of affirmative participation in the crime of uttering.

Nor does appellant's possession of a crowbar establish the required proof of the physical action necessary for aiding and abetting. As with the business card, the Government's evidence showed possession of the crowbar only on April 13. There was no evidence to support the district court's finding beyond a reasonable doubt that appellant used the crowbar to break into the Brown and Watkis mailboxes on April 1 and 4, respectively, to steal the two Treasury checks, or that he recorded the amounts of the checks and the dates he stole them on the card and turned them over to his sister to cash (R.174). The finding was pure speculation for there was no showing that the mailboxes were broken into with a crowbar. It was necessary at the very least for the Government to show that a crowbar was used to break into the mailboxes and that appellant was somewhere near the mailboxes at the time they were broken into.

The situation involved in United States v. Robinson, slip op. 1184 (2d Cir., July 28, 1977) (en banc), is instructive by comparison. In Robinson, a .38 caliber revolver had been used in a bank robbery. Some ten weeks later, Robinson was arrested, a .38 caliber revolver in his possession. Holding admissible the proof of Robinson's possession of the same type of gun used in the robbery, this Court stated that the possession of the .38 revolver by a person against whom there was independent proof of involvement in the robbery was so extraordinary as to give rise to more than a weak inference that he was one of the robbers. Here, the crowbar, a common, everyday tool possessed by thousands, had no distinguishing characteristics such as a gun's caliber. Furthermore, unlike the gun used in the Robinson bank robbery, there was no proof in this case that any kind of crowbar was used to break into the mailboxes or that appellant participated in the theft.

The district court's findings of fact were the result of speculation and conjecture, and the evidence is clearly insufficient to support them, even allowing for reasonable inferences from the circumstantial evidence. See United States v. Infanti, 474 F.2d 522, 526 (2d Cir. 1974)*; United States v. Gallishaw,

*A comparison between Infanti and the present case is also instructive: There, Kurtz, an attorney, and Infanti purchased tickets and travelled to Germany to negotiate the transfer of what were shown to be stolen stock certificates for 40% of their market value. Kurtz was present during the attempted negotiation of the stock. During these negotiations, the individuals who

428 F.2d 760 (2d Cir. 1970).

Moreover, the Government failed to prove that appellant knew that Treasury checks were involved and, consequently, that appellant had the intent to defraud the United States, a required element of 18 U.S.C. §495. Further, even if appellant knew that the account contained the proceeds of falsely endorsed Government checks when he attempted to cash his \$220 check, he would not be an accessory before the fact, as defined in 18 U.S.C. §2, because the crime had already been committed. This is so since the co-defendant, Marjorie Benton, had already falsely endorsed and deposited the checks in the Linda Perez account.** Thus, under this theory of the case, appellant could have been charged only with being an accessory after the fact, not before, as defined in 18

(Footnote continued from the preceding page)

were to buy the certificates attempted to write down the certificate numbers. At that point, Infanti retrieved the certificates and refused to allow the buyers to continue writing. Following the meeting, which did not result in a sale, Kurtz and Infanti went to London and then flew to New York, where they were arrested upon arrival. At that time, Kurtz also uttered a false exculpatory statement.

Despite Kurtz' essential presence during the negotiations -- negotiations that "would have been obvious to Kurtz, a lawyer, ... were less than legitimate", despite his quick detour to London and his false exculpatory statement, this Court found the evidence insufficient to establish a jury question of Kurtz' guilt. United States v. Infanti, supra, 474 F.2d at 522-523.

Here, the evidence of guilty knowledge is far weaker. There was no testimony that appellant discussed the matter with his sister or was present when she passed the checks.

**/ a matter of fact, she had already withdrawn the funds collected on such checks (R.48, 147; GX-9A).

U.S.C. §3, and the judgment convicting him of violating 18 U.S.C. §2 must be reversed. United States v. Ferraro, 414 F.2d 802 (5th Cir. 1969); Roberts v. United States, 416 F.2d 1216 (5th Cir. 1969).

In Ferraro, a bank teller embezzled \$19,000, left the bank, and was driven away by her boyfriend. At that point, she told him she had taken the money from the bank and showed it to him. The two fled the city and spent the money together. The Fifth Circuit held that the embezzlement was complete when the teller left the bank and met her boyfriend in the parking lot. Consequently, the court stated:

In other words, the theft was an accomplished fact when he learned of it. He did nothing to aid and abet its commission. As urged by the appellant below and here, he might have been charged as an accessory after the fact because of his joining in the flight and in the use and concealment of the stolen money.

* * *

But he was not so charged. The government should be required to prove the offense charged, not some other offense. This it clearly failed to do. The judgment of conviction therefore cannot stand.

United States v. Ferraro,
supra, 414 F.2d at 802, 804.

In Roberts, the defendant, accused of aiding and abetting, lived with other co-defendants. She accompanied her co-defendant, who was passing counterfeit bills, to a place where a woman intended to pass the bills. When the co-defendant tried to pass one, the store owner called the police. At that point, the woman

with the bills turned to the defendant and told her to take and destroy them. The court, following Ferraro, held that the defendant could not have aided or abetted her co-defendant in passing counterfeit money because that was already an accomplished fact. She could have been charged as an accessory after the fact, but since that charge was not included in the indictment, it could not stand.

The district court placed some reliance upon appellant's conflicting and false statements following his arrest as proof that he aided and abetted his sister. However, these statements were not exculpatory as to appellant, but rather were designed to mislead the authorities as to the culpability of his sister and to protect her. Even assuming that they are falsely exculpatory, the statements are "insufficient proof on which to convict where other evidence of guilt is weak and the evidence before the court is as hospitable to an interpretation consistent with the defendant's innocence as it is to the government's theory of guilt". United States v. Johnson, 513 F.2d 819, 824 (2d Cir. 1975); United States v. Kearse, 444 F.2d 62 (2d Cir. 1971); United States v. McConney, 329 F.2d 467 (2d Cir. 1964).

As noted above, the Government also failed to establish that appellant had the required knowledge that the stolen checks were Government checks or that the endorsements on the checks were forged. There was no proof that he ever saw the checks.

The judge's conclusion that he stole the checks was totally unsupported by any evidence offered by the Government (supra at page 11). Since there is no evidence appellant saw the checks at any other time, he could not have learned of their nature by observation. Further, the business card does not supply the necessary proof of knowledge (supra at page 10). Consequently, there has been insufficient proof of aiding and abetting.

CONCLUSION

For the foregoing reasons, the judgment of the district court must be reversed and the indictment dismissed.

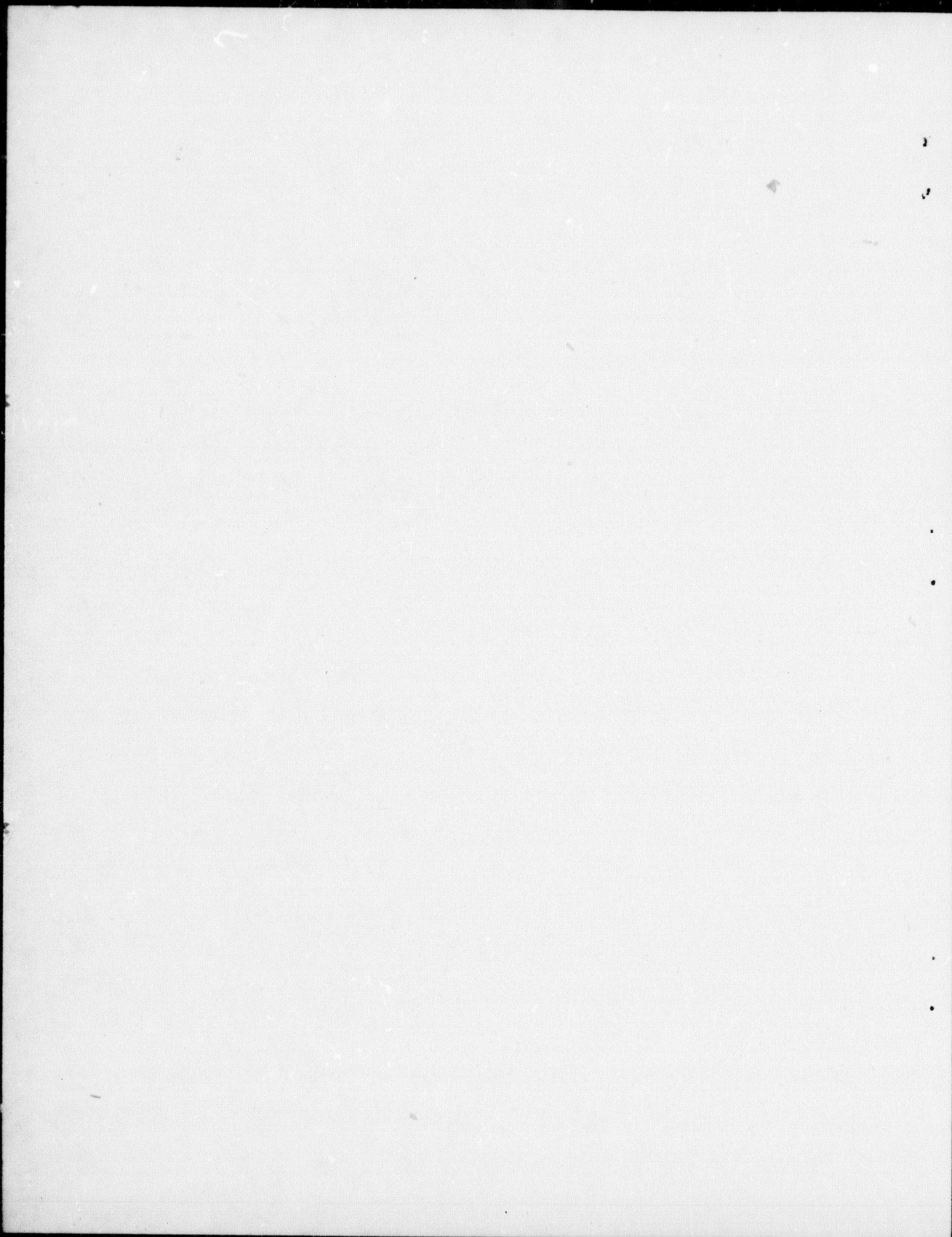
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